5

No. 08-1010

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

JEREMY FLAX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

REPLY BRIEF FOR PETITIONER

LAWRENCE A. SUTTER
JOY DAY
SUTTER, O'CONNELL & FARCHIONE
341 Cool Springs Blvd
Suite 430
Franklin, TN 37067
(615) 771-5008

THEODORE J. BOUTROUS, JR.
Counsel of Record
WILLIAM E. THOMSON
THEANE EVANGELIS KAPUR
BLAINE H. EVANSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Petitioner DaimlerChrysler Corporation, now Chrysler LLC

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition confirms that the decision below warrants review. The Tennessee Supreme Court, in a divided decision, reimposed a $13 million punitive damage award even though Chrysler's conduct satisfied every objective indicator of reasonableness. Respondents mischaracterize Chrysler's argument as presenting the question whether federal safety standards pre-empt state tort laws, and then attack their fictional construct. Opp. 13–21. But this is not a case about pre-emption. Rather, the question is whether the constitutional "fair notice" principle forbids punishment when a state's punitive damages law is so vague and indeterminate that a defendant cannot know in advance what conduct might subject it to punishment. The Court has noted this issue, *see Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 24 n.12 (1991), but has yet to squarely address it. This case offers an excellent opportunity to do so.

Chrysler's petition also demonstrated that certiorari is warranted to resolve the conflicts and confusion in the lower courts over the proper application of the comparable penalties guidepost, which the Tennessee court refused to apply in this case, as well as over the ratio guidepost, which plainly bars a punitive award that is more than five times the substantial compensatory award in this case. Respondents contend that the Tennessee Supreme Court's decision was correct. Opp. 21–26. They are wrong about that, but they cannot and do not dispute the many conflicts in the lower courts over these issues. As the court below noted with regard to the comparable penalties guidepost, "[w]e are unfortunately left with

little guidance" in this area, and "[o]ther courts have experienced similar frustrations." Pet. App. 35a. Review is warranted.

I. REVIEW IS NECESSARY TO CLARIFY THE "FAIR NOTICE" RULE IN THE CONTEXT OF PUNITIVE DAMAGE LIABILITY

The jury punished Chrysler for designing a minivan that exceeded federal strength requirements and was consistent with the design of virtually every other vehicle on the road. Chrysler's petition demonstrated that the Tennessee Supreme Court's decision upholding punitive damages deprived Chrysler of fair notice, and thus violated due process, because it permitted punishment without regard to objective indicators of reasonableness. Pet. 9–16.

Respondents' opposition relies on a fundamental mischaracterization of Chrysler's argument. Respondent contends that Chrysler is arguing that when a manufacturer complies with the Federal Motor Vehicle Safety Standards, punitive damages are barred as a matter of law. *See, e.g.*, Opp. 10, 13. But this is not Chrysler's argument.

Rather, Chrysler's argument is that where, as here, *all* objective indicators of reasonable conduct demonstrate that Chrysler's design decision, even if it could somehow be deemed negligent, was not outside the spectrum of objectively reasonable judgments, Chrysler did not have fair notice that the design could subject it to punishment. To be sure, compliance with federal safety standards is one of the indicators of reasonable conduct and is without question an important benchmark. But it is far from the only one. Compliance with industry custom is

another. In this case, Respondents' expert admitted that Chrysler's design was "average" and "fit in the middle" of all the seat designs on the road. Pet. App. 148a. Another indicator of reasonable conduct is the existence of a genuine debate within the relevant scientific or engineering community. Here too, the record shows that Chrysler's design judgment was reasonable, as there has long been a vigorous debate among engineers over the optimal level of seatback strength. Pet. App. 58a.

Respondents rely heavily on *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984). But their contention that *Silkwood* forecloses Chrysler's fair notice argument is misplaced. For one thing, the defendant in *Silkwood* did not comply with all federal standards, as Chrysler did here. *See* 464 U.S. at 243. Moreover, the defendant in *Silkwood* did not raise a due process challenge and did not make the fair notice argument that Chrysler has raised here; indeed, the Court expressly noted that the constitutionality of the state statute was not at issue. *Id.* at 247. *Silkwood* simply has nothing to do with due process limits on punitive damage awards; it was a case about federal pre-emption based on regulations promulgated by the Nuclear Regulatory Commission. Here, in contrast, Chrysler is not arguing that the Federal Motor Vehicle Safety Standards *pre-empt* state causes of action; rather, it is that due process requires that punitive damage awards be based on an objective assessment of the defendant's conduct, and the federal standards are one relevant benchmark.[1]

---

[1] The Restatement and the cases Respondents cite pertain to a state's determination of liability for compensatory damages, not the imposition of punitive damages. *See* RESTATEMENT

Respondents also contend that Tennessee enjoys "sovereign authority" to determine the relevance of a manufacturer's compliance with federal safety standards for purposes of its punitive damage laws. Opp. 14–18. But this is true only to a point. A state's interpretation of its punitive damage law must be exercised within constitutional constraints. And where, as here, a state interprets its punitive damage statute to authorize punishment without regard to objective indicators of reasonableness, it violates the Due Process Clause. Respondents' suggestion that state punitive damage regimes are immune from constitutional review on a "sovereign authority" theory is rebutted by virtually every major punitive damages decision from this Court. *See, e.g.*, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.").

Respondents concede that the Tennessee recklessness standard is indistinguishable from the recklessness standard at issue in *Safeco Insurance Company of America* v. *Burr*, 127 S. Ct. 2201 (2007). Opp. 16–17 n.4. In *Safeco*, this Court concluded that the defendant's interpretation of its legal duties, "albeit erroneous, was not objectively unreasonable" and emphasized that "[i]t is [the] high risk of harm, objectively assessed, that is the essence of reckless-

---

[Footnote continued from previous page]

(THIRD) OF TORTS: PRODS. LIAB. § 4 (1998); *Surles* v. *Greyhound Lines, Inc.*, 474 F.3d 288, 300–01 (6th Cir. 2007); *Brown* v. *Stone Mfg. Co.*, 660 F. Supp. 454, 459 (S.D. Miss. 1986).

ness at common law." *Id.* at 2215. Respondents attempt to distinguish *Safeco* on the basis that it was not a design defect case. Opp. 16–17 n.4. But *Safeco* cannot be read so narrowly. *Safeco* recognized that, at common law, recklessness must be evaluated by reference to objective indicators, such as "agency guidance." *Id.* at 2216 n.20. That was precisely the approach rejected by the Tennessee Supreme Court in this case. Just as in *Honda Motor Co. Ltd.* v. *Oberg*, 512 U.S. 415, 430 (1994), where this Court held Oregon's punitive damage scheme unconstitutional because it departed from common-law practice, Tennessee's scheme (as interpreted by its highest court in this case) violates due process because it departs from common-law practice by depriving defendants of a longstanding and critical common-law protection: fair notice of the conduct that will subject them to punishment.

Respondents contend that Chrysler's compliance with all objective indicators of reasonableness is immaterial because Chrysler was "aware" of the alleged defect in the minivan seat. Opp. 18–19. But the basis for this assertion is the testimony of Paul Sheridan, who is not an engineer but a former marketing employee. The fact that one of Chrysler's employees allegedly urged a different approach to seat design cannot provide the constitutionally mandated fair notice of what the law requires, particularly where the employee's approach differed from Chrysler's seat design engineers, the conclusions of federal safety regulators, other motor vehicle manufacturers, and engineers and safety experts throughout the industry. The question presented by this case is whether Chrysler's conduct was objectively reason-

able, and Mr. Sheridan's personal disagreement with Chrysler says nothing on this score.[2]

Respondents repeatedly attack the federal seatback strength standard as a "minimum" standard. Opp. 13. But Chrysler did more than just satisfy the standard—it exceeded it by more than three times. Pet. App. 59a.

Likewise, Respondents' contention that Chrysler acted recklessly because it knew the seatback would yield rearward and could cause injury, Opp. 19–20, grossly mischaracterizes the design decision at issue. Seatback design requires striking a balance between competing goals. *See* App. 58a. While Respondents argue that minivan seats should be very stiff so as to afford greater protection to rearseat occupants, their own expert Burton admitted that "the stiffer the seat is, the more the risk of something bad happening." 11/9 Tr. 211–12. Likewise, their expert Saczalski said that "we don't want a totally rigid seat" so "the key here is to find the seat that has the right amount" of yield. 11/8 Tr. 216. Respondents' claim that Chrysler "knew" of the risk allegedly posed by its design thus misses the point. To be sure, Chrysler recognized the risk, but recognizing a risk is not wrongful conduct; indeed, it is what we want manufacturers to do. Chrysler then made an objectively reasonable judgment as to how best to *manage* that

---

[2] In fact, the Tenth Circuit has determined that Mr. Sheridan is "'wholly unqualified' to testify on seat back failure . . ., FMVSS 207, or anything related to controlled yield." *Gardner* v. *Chrysler Corp.*, 89 F.3d 729, 737 (10th Cir. 1996). And yet the Tennessee Supreme Court held that Sheridan's testimony could override Chrysler's compliance with all objective indicators of reasonableness.

risk, without creating *greater* risks for its customers by using a seat design that did not yield enough.

The divided Tennessee Supreme Court's decision provides no way for a manufacturer to ensure during the design of a product that its conduct complies with what a jury may determine post hoc was required. *See* PLAC Amicus Br. 17. A manufacturer that complies with every objective indicator of lawfulness may still be found to have violated the law if a single engineer it employs disagrees with its conclusion. This is especially problematic in designs, like the one at issue in this case, involving competing risks because the design must obtain an optimal balancing of those risks, and making the product safer in one respect may have the effect of making it less safe in another respect. Tennessee's arbitrary and standardless approach violates the Due Process Clause and warrants review by this Court.

II. REVIEW IS NECESSARY TO RESOLVE THE CONFUSION OVER THE COMPARABLE PENALTIES AND RATIO GUIDEPOSTS

Chrysler's petition identified two questions that have split the lower courts: whether a court may simply decline to apply the comparable penalties guidepost, as the Tennessee Supreme Court did here; and whether a 1:1 ratio between compensatory and punitive damages is the constitutional maximum where the compensatory award is substantial, as it is here. Respondents have little to say in response, and devote their opposition to arguing that the result below was *correct*. Tellingly, they do not dispute the existence of circuit splits over the questions presented, thus implicitly conceding that certiorari is warranted. *See Danforth* v. *Minnesota*, 128 S. Ct.

1029, 1034 (2008) (granting petition to resolve confusion even though it was "clear" that lower court was correct).

A. In what has become an increasingly common refrain in the lower courts, the Tennessee Supreme Court stated that it did not know how to apply the comparable penalties guidepost. It surveyed the caselaw and reported that many courts are "experienc[ing] . . . frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether." Pet. App. 35a (citing cases). The court ultimately threw up its hands, reasoning that while the third guidepost "seems to compel a dramatically different conclusion" than the one the court ultimately reached, the problem could be avoided by simply not applying the guidepost in this case. Pet. App. 33a.

Respondents insist that refusing to apply the comparable penalties guidepost when it produces an unwelcome result represents a "faithful[ ] and meticulous[ ]" application of "this Court's teachings on punitive damages." Opp. 21. Nowhere, however, do Respondents deny the point that the Tennessee Supreme Court made—that the lower courts are confused and divided over how to apply the comparable penalties guidepost. Chrysler's petition canvassed the caselaw and demonstrated the many different and conflicting approaches the lower courts have taken to the comparable penalties guidepost. Pet. 20–25. Respondents are utterly silent in response. Chrysler's showing that this is an issue warranting review stands unrebutted.

Respondents' arguments on the merits fare no better. They claim that Chrysler seeks to "elevate the third guidepost into a conclusive and overriding

factor." Opp. 22. But that is not Chrysler's argument. Chrysler's position is merely that the comparable penalties guidepost cannot be disregarded, as the Tennessee Supreme Court did here. To be sure, there may be cases where the comparable penalties guidepost suggests a different result than the reprehensibility or ratio guideposts. But that is no basis for declining to apply it.

Respondents assert that requiring application of the comparable penalties guidepost would cause parties to "inundate the court with analogous legislative judgments." Opp. 22. But the consideration of "analogous legislative judgments" is precisely what the Constitution requires. *See State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003) (due process requires comparison "between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases").

Respondents contend that the Tennessee Supreme Court correctly determined that the most relevant legislative penalties were inapplicable because they were not large enough to punish or deter the alleged wrongful conduct. Opp. 23. But the purpose of the comparable penalties guidepost is to ensure that the defendant had "fair notice" of the amount of the sanction that could be imposed for the conduct in question. The court's view that a higher penalty was necessary to achieve policy goals of punishment and deterrence is irrelevant to the "fair notice" determination. Permitting a court to ignore the legislatively authorized penalties for comparable conduct in favor of its own subjective judgment of the size of the penalty necessary to achieve optimal punishment and deterrence drains the comparable penalties guidepost of any constraining force.

B. The Tennessee Supreme Court also misapplied the ratio guidepost in a way that conflicts with this Court's guidance as well as with decisions from other courts. Even though the compensatory damage award was undeniably "substantial," the court nonetheless upheld a punitive damage award that was more than five times the compensatory award. This holding cannot be reconciled with *State Farm*, where this Court strongly indicated that where compensatory damages are "substantial," a 1:1 ratio is the maximum the Constitution permits, nor with *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605 (2008), which reduced a punitive damage award under federal maritime common law to achieve a 1:1 ratio. Moreover, it conflicts with the approaches taken by the Third, Sixth and Eight Circuits, all of which have followed this Court's guidance and properly remitted punitive damage awards where the compensatory award was substantial. Pet. 26–28.

Here too, Respondents do not dispute Chrysler's showing that this is an issue that has deeply divided the lower courts. Rather, the only response Respondents offer is that this Court to date has declined to impose a bright-line ratio in punitive damage cases. Opp. 24–25. Certainly if the Court were inclined to impose a clear rule, this case presents an excellent vehicle for doing so. A clear rule would bring relief to an area of law that continues to be plagued by inconsistency and by irrational and arbitrary punishments.

But even if the Court declines to recognize a bright-line rule, a decision clarifying its statements in *State Farm* and *Exxon* would help resolve the confusion in the lower courts. As Chrysler has shown, the courts have interpreted the meaning of "substantial" in different and conflicting ways, Pet. 23–28,

and these conflicts—which Respondents do not dispute—merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE A. SUTTER
JOY DAY
SUTTER, O'CONNELL
& FARCHIONE
341 Cool Springs Blvd
Suite 430
Franklin, TN 37067
(615) 771-5008

THEODORE J. BOUTROUS, JR.
Counsel of Record
WILLIAM E. THOMSON
THEANE EVANGELIS KAPUR
BLAINE H. EVANSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

April 16, 2009